

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. ()

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKWOOD HOMES LLC, a Colorado Limited Liability Company;; and
NIEBUR GOLF, INC., an Oregon Corporation,

Defendants.

COMPLAINT

The United States of America, by and through the United States Attorney for the District of Colorado, by the authority of the Attorney General, and at the request of the Secretary of the Army, acting by and through the Chief of the United States Army Corps of Engineers, for its Complaint states as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under sections 301(a), 309(b) and (d), and section 404(s)(3) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(b) and (d), and 33 U.S.C. § 1344(s)(3), to obtain injunctive relief and civil penalties against Oakwood Homes LLC; and Niebur Golf, Inc. ("Defendants"), for the discharge of pollutants into waters of the United States in the City and County of Denver, Colorado,

without authorization of the United States Department of the Army, in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

2. In this action, the United States seeks:

- A. To enjoin the discharge of pollutants into waters of the United States without a permit, and in contravention of the conditions and limitations of a permit, in violation of CWA section 301(a), 33 U.S.C. § 1311(a);
- B. To require Defendants to fully comply with the terms and conditions of a permit or an amended permit issued by the United States Army Corps of Engineers (“Corps”) ;
- C. To require Defendants, at their own expense and at the direction of the Corps, to restore and/or mitigate the damages caused by their unlawful activities; and
- D. To require Defendants to pay civil penalties as provided in CWA section 309(d), 33 U.S.C. § 1319(d), and section 404(s)(4) of the CWA, 33 U.S.C. §1344(s)(4).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b); and CWA section 404(s)(3), 33 U.S.C. § 1344(s)(3); and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the District of Colorado pursuant to CWA section 309(b), 33 U.S.C. § 1319(b); CWA section 404(s)(3), 33 U.S.C. § 1344(s)(3); and 28 U.S.C. § 1391(b) and (c), because Defendants conduct business in the District of Colorado, the subject property is located in the District of Colorado, and the causes of action alleged herein arose in the District of Colorado.

THE PARTIES

5. The Plaintiff in this action is the United States of America.

6. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and CWA section 506, 33 U.S.C. § 1366.

7. Defendant Oakwood Homes LLC (“Oakwood Homes”) is a limited liability company organized under the laws of the State of Colorado with a business address of 4908 Tower Road, Denver, Colorado 80249.

8. Defendant Niebur Golf, Inc. is a corporation organized under the laws of the State of Oregon, with a business address of 675 Southpointe, Suite 100, Colorado Springs, Colorado 80906.

9. At all times relevant to the Complaint, one or more of the Defendants either owned, leased or otherwise controlled the real property that is the subject of this Complaint and/or otherwise controlled the activities that occurred on such property.

STATUTORY BACKGROUND

10. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

11. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

12. CWA section 404(s)(3), 33 U.S.C. § 1344(s)(3), authorizes the Secretary of the Army, acting through the Chief of Engineers of the Corps, to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a

violation of any condition or limitation set forth in a permit issued by the Secretary of the Army.

13. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

14. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and cellar dirt.

15. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

16. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. §§ 230.3(s) and 232.2 define "waters of the United States" to include:

- A. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce;
- B. All inter-state waters;
- C. Tributaries to such waters; and
- D. Wetlands adjacent to such waters or their tributaries.

17. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2, 230.3(t), 230.41, and 232.2 define "wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

18. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

19. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual [or] corporation."

20. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

21. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

GENERAL ALLEGATIONS

22. On June 10, 1999, Defendant Oakwood Homes applied to the Corps for a permit under CWA section 404, 33 U.S.C. § 1344, to discharge fill material into First Creek and associated wetlands for the purpose of constructing flood control and retention facilities, as well as a golf course and surrounding development.

23. Following a period of review by other Federal and State agencies, an opportunity for public comment, and discussions with Defendant Oakwood Homes, a permit, pursuant to CWA section 404, 33 U.S.C. § 1344, was issued by the Corps on December 23, 1999, to Defendant Oakwood Homes ("Permit").

24. Regulations, adopted by the Corps for the purpose of implementing its permitting authority, provide that conditions will be added to permits when necessary to

satisfy legal requirements or to protect the public interest. 33 C.F.R. §§ 325.4 (a) and 325.5 (a) (2).

25. The Permit includes 23 General Conditions, eight Special Conditions, and a specific Detailed Description of Authorized Work.

26. The Permit also includes the following stipulation:

After a detailed and careful review of all of the conditions contained in this permit, the permittee acknowledges that, although said conditions were required by the Corps of Engineers, nonetheless the permittee agreed to those conditions voluntarily to facilitate issuance of the permit; the permittee will comply fully with all the terms of all the permit conditions.

27. The Permit was signed by Mr. Dick Leopoldus, acting pursuant to the authority of, and as the agent and representative of, Defendant Oakwood Homes, and by Mr. Timothy T. Carey, on behalf of the Corps.

28. By Special Warranty Deed, effective January 31, 2000, Town Center Metropolitan District ("Town Center") acquired right, title and interest to all or part of the property encompassing the site known as the Green Valley Ranch Golf Course (hereinafter referred to as the "Site").

29. On or about April 14, 2000, Town Center and Defendant Niebur Golf entered into a golf course development agreement ("Development Agreement") pursuant to which Defendant Niebur Golf agreed to construct an eighteen-hole golf course together with a related clubhouse, maintenance building, practice facilities and amenities ("Golf Course").

30. In addition, the Development Agreement granted Defendant Niebur Golf the exclusive right to maintain, manage and operate the Golf Course.

31. Beginning on or about December 1999 and on one or more occasions thereafter, the exact date or dates being best known to the Defendants, Defendant Niebur Golf, and/or persons acting on its behalf, discharged dredged or fill material into waters of the United States at, near, and adjacent to the Site, in the City and County of Denver, Colorado, without a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344, and in violation of the conditions and limitations of the Permit.

32. Each specific area of violation at the Site is identified in a separate Count below.

33. After verifying that the conditions and limitations of the Permit had been violated in at least one respect, the Corps notified Mr. Dick Leopoldus and Defendant Oakwood Homes, by certified letter dated May 4, 2001, that the Corps was investigating violations of the Permit.

34. By letter dated May 16, 2001, Defendant Oakwood Homes acknowledged receipt of the Corps' letter dated May 4, 2001 ("Oakwood Homes Letter").

35. The Oakwood Homes Letter included the following admission:

Oakwood Homes fully intends to do everything possible to comply with all reasonable corrective actions to bring the project into compliance with the Department of the Army permit.

36. The Oakwood Homes Letter was signed by Mr. Dick Leopoldus.

37. Thereafter, Defendant Oakwood Homes, Defendant Niebur Golf and the Corps agreed that Defendants would redesign and reconstruct the Golf Course to cure and to otherwise mitigate the violations of the Permit.

38. During the latter part of 2001 and early 2002, Defendants redesigned and reconstructed the Golf Course to cure and to otherwise mitigate the violations of the Permit.

39. The dredged or fill material that Defendant Niebur Golf and/or persons acting on its behalf caused to be discharged includes, among other things, dirt, soil, rock and sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

40. Defendant Niebur Golf and/or persons acting on its behalf used mechanized land-clearing and earth-moving equipment to accomplish the discharges referred to in paragraph 39 of this Complaint.

41. The equipment referred to in paragraph 40 of this Complaint constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

42. The Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers of the Corps, for certain of the discharges of dredged or fill material into waters of the United States as required by CWA section 301(a), 33 U.S.C. § 1311(a).

43. The Defendants violated the conditions and limitations of the Permit that Defendants did obtain with respect to other discharges of said material into waters of the United States, in contravention of CWA section 404(s), 33 U.S.C. § 1344(s).

44. One or more of the Defendants either owned, leased or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

45. One or more of the Defendants conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities referred to in this Complaint.

46. The Defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

47. The Defendants have violated CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States, including wetlands, at the Site.

48. The Defendants have violated CWA section 404(s), 33 U.S.C. § 1344(s), by their discharges of dredged or fill material into waters of the United States in violation of conditions or limitations set forth in the Permit at the Site.

49. Each day that such dredged or fill material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

50. Defendant Niebur Golf no longer owns any interest or has any involvement in or with the Golf Course or in the operation of the Golf Course.

51. Defendant Oakwood Homes has or in the near future will apply to the Corps for an amendment to the Permit ("Amended Permit").

52. Defendant Oakwood Homes has agreed that the Amended Permit shall encompass such restoration and mitigation projects as required by the Corps.

COUNT 1

53. Paragraphs 1 through 52 of this Complaint are incorporated herein by reference as if set forth fully herein.

54. General Condition 4 of the Permit provides that if the property that is the

subject of the Permit is transferred, the successor in interest must affix its signature to the Permit, thereby agreeing to be bound by the Permit terms and conditions.

55. After the Permit is duly executed by the successor in interest, the holder of the Permit is required to return a copy of the Permit, as executed, to the Corps in order that the Corps can validate the transfer of the Permit.

56. On or about January 31, 2000, the property that is the subject of the Permit was transferred from Defendant Oakwood Homes to Town Center.

57. After the transfer of the property that is subject to the Permit, Town Center, the successor in interest to the Permit, was required to affix its signature to the Permit and Defendant Oakwood Homes was required to return a copy of the Permit, as executed, to the Corps in order that the Corps could validate the transfer of the Permit.

58. Defendant Oakwood Homes has failed to comply with General Condition 4 of the Permit.

59. Any discharge or discharges of dredged or fill materials at the Site by Defendant Niebur Golf, therefore, were and are unauthorized and in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

COUNT 2

60. Paragraphs 1 through 59 of this Complaint are incorporated herein by reference as if set forth fully herein.

61. The Permit includes a section entitled "Detailed Description of Authorized Work" ("Detailed Description").

62. The Detailed Description is incorporated into the Permit at pages four to seven of the Permit and constitutes a limitation of the Permit.

63. The Detailed Description delineates specific criteria for the design and construction of many features of the authorized work.

64. The Detailed Description requires vegetation buffer zones adjoining several holes of the Golf Course on the Site, including holes Ten (10), Sixteen (16) and Seventeen (17).

65. Buffer zones, particularly in a golf course setting, are often necessary for wetlands and wildlife habitat protection, as well as to enhance channel stabilization.

66. With respect to hole Seventeen (17) of the Golf Course on the Site, the Detailed Description also directs that a graded area adjacent to hole Seventeen (17) of the Golf Course on the Site be set aside to serve both as a site for mitigation of wetlands adversely impacted by the authorized work and as a source for flood control storage.

67. Defendant Niebur Golf built holes Ten (10), Sixteen (16) and Seventeen (17) of the Golf Course on the Site, or caused holes Ten (10), Sixteen (16) and Seventeen (17) of the Golf Course on the Site to be built, contrary to the requirements of the Detailed Description, resulting in reductions in the size and effectiveness of the buffer zones, the loss of acreage needed for mitigation and flood control storage, and other deleterious effects.

68. The failure of one or more of the Defendants to comply with the Detailed Description in the construction of holes Ten (10), Sixteen (16), and Seventeen (17) of the Golf Course on the Site contravenes the limitations of the Permit and constitutes a violation of CWA section 404(s), 33 U.S.C. § 1344(s).

COUNT 3

69. Paragraphs 1 through 68 of this Complaint are incorporated herein by reference as if set forth fully herein.

70. On September 13, 1999, the Colorado Department of Public Health and Environment, Water Quality Control Division, issued a water quality certification ("Certification") for the activities described in the Permit application of Defendant Oakwood Homes, as further set forth in paragraph 22 of this Complaint.

71. The Certification was issued pursuant to the provisions of CWA section 401, 33 U.S.C. § 1341.

72. By the terms of CWA section 401(a), 33 U.S.C. § 1341(a), no permit or license shall be granted until a water quality certification has been obtained, or has been waived.

73. General Condition 5 of the Permit provides that if a conditioned water quality certification has been issued, the permittee must comply with the conditions specified in the certification.

74. The Certification was, therefore, incorporated into, and made a condition of, the Permit.

75. The Certification is expressly conditioned upon compliance with the Best Management Practices attached to, and made a part of, the Certification.

76. The Best Management Practices made a part of the Certification, among other requirements, specify that permanent erosion control measures must be installed at the Golf Course on the Site at the earliest practicable time consistent with good construction practices and must be maintained as necessary throughout the operation

of the Golf Course on the Site; and that materials which are potential sources of toxic pollutants must be prevented from entering water courses.

77. From at least May 2001 to July 2001, Defendant Niebur failed to install or maintain erosion controls at or near holes Sixteen (16) and Seventeen (17) of the Golf Course on the Site.

78. The failure to install or maintain erosion controls at or near holes Sixteen (16) and Seventeen (17) of the Golf Course on the Site, left the Site, at those locations, exposed to potentially significant erosion and unable to withstand predictable high flows in First Creek.

79. On at least one occasion, one or more of the Defendants have dumped, or caused to be dumped, grass clippings and waste into buffer zones and wetlands at or near hole Sixteen (16) of the Golf Course on the Site, creating a potential for the introduction of fertilizers, chemicals, and other toxic pollutants into waters of the United States.

80. The actions, and failures to act, of one or more of the Defendants, as described in paragraphs 77, 78 and 79 of this Complaint, are violations of a condition of the Permit, and constitute a violation of CWA section 404(s), 33 U.S.C. § 1344(s).

COUNT 4

81. Paragraphs 1 through 80 of this Complaint are incorporated herein by reference as if set forth fully herein.

82. General Condition 20 of the Permit requires "that the disposal area, method of disposal, or methods of dredging will not be changed without prior written approval of the District Engineer."

83. The District Engineer referred to in paragraph 82 of this Complaint is the District Engineer of the Corps' Omaha District.

84. On a date or dates best known to the Defendants, Defendant Niebur Golf discharged, or caused to be discharged, dredged or fill materials into wetlands adjacent to First Creek.

85. First Creek and wetlands adjacent thereto are "waters of the United States" within the meaning of CWA section 502(7), 33 U.S.C. § 1362(7), and regulations promulgated thereunder.

86. The discharge or discharges referred to in paragraph 84 of this Complaint, which occurred at or near a bridge located between holes Sixteen (16) and Seventeen (17) of the Golf Course on the Site, created a potential obstruction to overbank flows in First Creek and potentially impacted stream stability.

87. The discharge or discharges, as described in paragraphs 84, 85 and 86 of this Complaint, were not in conformity with the Permit.

88. The Defendants did not receive the prior written approval of the District Engineer to engage in the discharge or discharges, as described in paragraphs 84, 85 and 86 of this Complaint.

89. The discharge or discharges, as described in paragraphs 84, 85 and 86 of this Complaint, violated a condition of the Permit and, therefore, were a violation of CWA section 404(s), 33 U.S.C. § 1344(s).

90. The discharge or discharges, as described in paragraphs 84, 85 and 86 of this Complaint and to the extent engaged in by one or more of the Defendants not a

party to the Permit, were without a permit and, therefore, in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the United States of America respectfully requests that this Court order the following relief:

- A. That Defendant Oakwood Homes be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the Clean Water Act;
- B. That Defendant Oakwood Homes be ordered to fully comply with the terms and conditions of the Permit or the Amended Permit;
- C. That Defendant Oakwood Homes be ordered to undertake measures, at Defendant Oakwood Homes' expense and at the direction of the United States Army Corps of Engineers, to effect complete restoration of the Site and/or to conduct off-Site mitigation of irreversible environmental damage, as appropriate, and in compliance with the terms and conditions of the Permit or the Amended Permit;
- D. That Defendant Oakwood Homes and Defendant Niebur Golf be assessed, jointly and severally, pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and CWA section 404(s)(4), 33 U.S.C. § 1344(s)(4), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a), and CWA section 404(s)(1), 33 U.S.C. § 1344(s)(1);

- E. That the United States be awarded costs and disbursements in this action; and
- F. That this Court grant Plaintiff United States of America such other relief as the Court may deem just and proper.

Dated: September 17, 2004.

Respectfully submitted,

JOHN W. SUTHERS
United States Attorney

STEPHEN D. TAYLOR
Assistant U.S. Attorney
1225 Seventeenth Street
Suite 700
Denver, CO 80202

Telephone: (303) 454-0100

Plaintiff's Address:

U.S. Army Corps of Engineers
Omaha District
Denver Regulatory Office
9307 South Wadsworth Boulevard
Littleton, CO 80128

